No. 01-502

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN FISCHER, Superintendent of
Sing Sing Correctional Facility,

Petitioner,

-against-

VICTOR ZARVELA,

Respondent.

RESPONSE TO PETITION FOR A

WRIT OF CERTIORARI

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September 24, 2001

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly ruled that the District Court should have stayed the exhausted claims in the respondent's original federal habeas corpus petition during the reasonable time period in which the respondent promptly returned to the state court to exhaust his remaining claims and then promptly returned to the District Court for review of his petition, and whether this ruling was in conformity with the provisions of the Antiterrorism and Effective Death Penalty Act of 1996.

PARTIES TO THE PROCEEDING

The petitioner in this Court is Brian Fischer, the Superintendent of Sing Sing Correctional Facility, the state prison where respondent Victor Zarvela is presently incarcerated. Mr. Fischer has been substituted for Christopher Artuz, the superintendent of the correctional facility where the respondent was previously incarcerated. Mr. Fischer is represented in this federal habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York. The respondent is represented by Randall D. Unger, an attorney appointed by the United States Court of Appeals for the Second Circuit pursuant to the Criminal Justice Act of 1964.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Victor Zarvela, the respondent, respectfully requests that this Court deny the petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that reversed a judgment of the United States District Court for the Eastern District of New York (Raggi, J.), which had dismissed the respondent's petition for a writ of habeas corpus, and remanded the case to that court for a review of the merits of the petition.

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is Zarvela v. Artuz, 254 F.3d 374 (2d Cir. 2001). The opinion of the United States District Court for the Eastern District of New York is not officially reported. The LEXIS citation of that opinion is Zarvela v. Artuz, No. 97-CV-2393, 1999 U.S. Dist. LEXIS 20602 (E.D.N.Y. Dec. 3, 1999). The citation of the opinion of the Appellate Division, Second Department is People v. Zarvela,, 211 A.D.2d 690, 622 N.Y.S.2d 465 (2nd Dept. 1995). The opinions of the New York State trial court that denied the respondent's motions to vacate the judgment of conviction are not officially reported.

Statutory Provision Involved

28 United States Code 2244 provides in pertinent part:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Introduction

The respondent was convicted, after a jury trial, of the crimes of murder in the second degree and criminal possession of a weapon in the second degree. On January 21, 1992, he was sentenced to concurrent terms of imprisonment of 25 years to life for the murder count and 5 to 15 years for the weapon count. He appealed his judgment of conviction to the Supreme Court of the State of New York, Appellate Division, Second Department which affirmed his conviction. Subsequently, the New York Court of Appeals denied the respondent's application for permission to appeal to that court.

On April 22, 1997, the respondent filed a pro se petition for a writ of habeas corpus with the United States District Court for the Eastern District of New York. Before the petitioner had submitted a response to this petition, the respondent wrote a letter to the District Court informing that he had just acquired new exculpatory evidence as a result of a Freedom of Information Act request and that he wished to withdraw his petition "without prejudice and leave to renew at a later date". In a handwritten notation which was dated June 2, 1997, the District Court granted the respondent's request to withdraw and directed the clerk of the court to mark the case closed.

After the respondent presented his new claim to the highest state court, he refiled his petition for a writ of habeas corpus with the District Court. On December 3, 1999, the District Court dismissed the respondent's petition on the ground that it had been filed nine days after the expiration

of the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA").

In its decision of June 14, 2001, the United States Court of Appeals for the Second Circuit reversed the District Court's dismissal of the respondent's petition and remanded the case for consideration of the respondent's claims. In so ruling, the Court of Appeals held that the District Court had erred when it failed to stay the portion of the respondent's original petition which contained fully exhausted claims; that the original petition should have been held in abeyance while the respondent returned promptly to the state court to exhaust his new claim, and that the respondent's prompt return to the District Court following the exhaustion of his new claim warranted a finding that his petition was timely and that the merits of his claims should be considered.

The Direct State Court Appeal

In his brief filed with the Supreme Court of the State of New York, Appellate Division, Second Department, the respondent argued that his right to a fair trial was violated by three errors: the trial court's refusal to admit testimony that shortly after the crime, an eyewitness had made a statement to another person that exculpated the respondent; the trial court's admission of extensive evidence regarding the respondent's alleged narcotics activities, and the trial court's jury instruction defining reasonable doubt. The Appellate Division affirmed the respondent's conviction in People v. Zarvela, 211 A.D.2d 690, 622 N.Y.S.2d 465 (2nd Dept. 1995).

The respondent then applied for leave to appeal to the New York Court of Appeals and submitted a letter and a copy of his Appellate Division brief in support of his application. In a certificate issued on June 2, 1995 by the Hon. Carmen Beauchamp Ciparick, an associate judge of

the New York Court of Appeals, that court denied the respondent's application. People v. Zarvela, 86 N.Y.2d 743, 631 N.Y.S.2d 624 (1995).

The First State Court Collateral Challenge

In a pro se motion dated November 9, 1993, the respondent moved before the trial court for an order vacating the judgment of conviction pursuant to N.Y. Criminal Procedure Law 440.10. In this motion, he alleged three separate grounds supporting vacatur: the ineffectiveness of his trial counsel for failing to seek dismissal of the indictment due to the presence of an unauthorized person in the grand jury room during the presentment; his exclusion from side-bar conferences during the trial, and newly discovered exculpatory evidence reflected in the written statements of two witnesses who claimed to have observed the crime in question. The trial court denied this motion in a decision dated March 15, 1995 and the Appellate Division, Second Department denied the respondent's application for leave to appeal the trial court's denial in a decision and order dated June 20, 1995.

The First Federal Habeas Corpus Petition

In a pro se petition dated April 22, 1997, the respondent sought a writ of habeas corpus from the United States District Court for the Eastern District of New York. In his petition, he raised the same claims that he had asserted in his state court appeal, as well as the claims that he had asserted in his 440.10 motion. Subsequent to the filing of this petition, on May 26, 1997, the respondent wrote a letter to the District Court informing that he had just acquired new exculpatory evidence as a result of a Freedom of Information Act request and that he wished to withdraw his habeas petition "without prejudice and leave to renew at a later date". On June 2, 1997, the District Court endorsed the following ruling on the respondent's letter: "Motion to withdraw granted. Clerk to mark case

closed. So ordered. Notice: All parties." The District Court's ruling was subsequently entered on the docket on August 21, 1997.

The Second State Court Collateral Challenge

In a pro se motion dated June 11, 1997, the respondent again moved before the trial court for an order vacating his judgment of conviction based upon newly discovered evidence pursuant to N.Y. Criminal Procedure Law 440.10. In support of this motion, he submitted the affidavits of three witnesses who provided exculpatory evidence on the respondent's behalf. The trial court denied this motion in a decision dated July 31, 1998 and the Appellate Division, Second Department denied the respondent's application for leave to appeal the trial court's denial in a decision and order dated September 23, 1998.

The Second Federal Habeas Corpus Petition

In a pro se petition dated October 7, 1998, the respondent again sought a writ of habeas corpus from the United States District Court for the Eastern District of New York. In this petition, he again asserted the claims that he had raised in his first habeas corpus petition, as well as the newly discovered evidence claim that he had raised in his second 440.10 motion.

The District Court Decision

After reviewing the procedural history of the respondent's state and federal litigation, the District Court ruled that the respondent's petition had been filed nine days late under the statute of limitations set forth in the AEDPA and that the respondent's claims were therefore time-barred. In so ruling, the court rejected the respondent's argument that the AEDPA limitation period should be

equitably tolled due to his lack of fluency in the English language and his confinement in "lock down" from June until November, 1998.

The Court of Appeals Decision

In an opinion dated June 14, 2001, the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the respondent's case for consideration of the merits of the respondent's claims. In its decision, the Court of Appeals concluded that the District Court should have stayed the respondent's original habeas corpus petition while the respondent returned to state court to exhaust his newly discovered evidence claim and that the stay should have been conditioned on the respondent's prompt initiation of state court litigation and his prompt return to federal court after completion of exhaustion. To dispel concerns about excessive delays that might arise in seeking exhaustion and returning to federal court, and to effectuate the purpose of the AEDPA's limitation period, the Court of Appeals held that the District Court could limit the duration of the stay to a reasonable time period of 30 days for initiating exhaustion and 30 days for the return to federal court. Applying these standards to the respondent's case, the Court concluded that his habeas corpus petition was timely filed because his original petition had been filed two days before the expiration of the AEDPA one-year limitation period and because the respondent's "prompt trip to and from the state courts satisfied the conditions that should have been included in a stay". 254 F.3d at 383.

REASONS FOR DENYING THE WRIT

The Second Circuit's Decision Is Consistent With The Decisions Of This Court And Does Not Conflict With The Decisions Of Other Federal Courts Of Appeals Regarding The Handling Of Mixed Habeas Corpus Petitions. Nor Does The Second Circuit's Decision Run Afoul Of The One-Year Limitation Period Set Forth In The AEDPA.

In the petition for a writ of certiorari submitted to this Court, the petitioner claims that the Second Circuit's decision "is inconsistent with the decision of this Court in Rose v. Lundy, 455 U.S. 509 (1982)"; that it "adds to an existing conflict among the federal courts of appeals" and that it "plainly conflicts with the terms of the applicable statute of limitations" set forth in the AEDPA. However, a careful review of the Second Circuit's holding supports the conclusion that the decision represents a sound interpretation of the applicable statute and precedent and that no conflict with the decisions of other circuits is occasioned by this decision. The petition for a writ of certiorari should therefore be denied.

The doctrine of exhaustion has long been recognized as one of the cornerstones of federal habeas corpus jurisprudence. United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925). Under this doctrine, which is now codified, habeas relief is not available "unless it appears that the applicant has exhausted the remedies available in the courts of the State". 28 U.S.C. 2254 (b) (1) (A). The basis for requiring exhaustion is one of comity, a recognition that the public good requires that the relations between the federal and state courts "be not disturbed by unnecessary conflict between courts equally

bound to guard and protect rights secured by the Constitution." Ex parte Royall, 117 U.S. 241, 251 (1886).

To futher the policy of comity, this Court has held that a rule of "total exhaustion" must be strictly applied to habeas petitions which contain both unexhausted and exhausted claims and that a district court must dismiss a so-called "mixed petition". Rose v. Lundy, 455 U.S. 509 (1982). At the time the court dismisses such a petition, the prisoner must be afforded the choice of either returning to state court to exhaust his claims or of amending or resubmitting his petition to the district court, presenting only those claims that have been properly exhausted. Id. at 510.

One of the petitioner's primary contentions in support of his request for certiorari is that the Second Circuit's decision is inconsistent with this Court's ruling in Rose v. Lundy which, the petitioner argues, "makes clear that staying the petition is not an available alternative" (Pet. at p.15). However, it is crucial to note that in Rose v. Lundy, this Court had no occasion to consider the question of whether a district court could stay a mixed petition. On the contrary, as the Second Circuit noted in its decision, the only question which this Court determined in Rose v. Lundy was whether a district court could proceed to adjudicate a mixed petition. Thus, it cannot be concluded that the Second Circuit's holding that the district court could and should stay the respondent's exhausted claims is contrary to this Court's precedent.

Moreover, as was noted by Justice Stevens in his concurring opinion in Duncan v. Walker, ___ U.S. ___, 121 S. Ct. 2120, 2130 (2001):

> "in our post-AEDPA world there is no reason why a district court should not retain jursidiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so when AEDPA

> gives a district court the alternative of simply denying a petition containing unexhausted but meritorious claims, see 28 U.S.C. 2254 (b) (2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period."

Justice Stevens' conclusion concerning the propriety of a stay pending full exhaustion of a prisoner's state remedies was virtually echoed by the Second Circuit in its decision in this case. Noting that "the enactment of the AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made", the Second Circuit reasoned that a stay of the exhausted claims, rather than a dismissal of the entire petition, would avoid the risk that a prisoner might suffer the loss of all of his claims due to the one-year limitation period which would likely expire during the time in which he was returning to state court to exhaust his unexhausted claims and then returning to federal court to reassert all of his claims.

It is clear that the Second Circuit's decision is not only consistent with this Court's holding in Rose v. Lundy, it promotes the very policy which this Court sought to preserve in that case: the minimization of friction between our state and federal court systems by deferring action on prisoners' applications until the state courts have had an opportunity to rule on the claims asserted. Id. at 518; Duckworth v. Serrano, 454 U.S. 1, 3 (1981). Since relief under Sect. 2254 is essentially an equitable remedy, a stay of a prisoner's exhausted claims during the brief time period in which his remaining claims are being exhausted in the state court, represents precisely the sort of deference which our federal courts owe to our state courts. Post v. Gilmore, 111 F.3d 556, 557 (7th Cir. 1997). And of course, in a case in which the denial of such a stay might, and in the respondent's case did, result in a deprivation of a prisoner's right to obtain federal review of a meritorious claim due to the lapse of

AEDPA's one-year limitations period, the Second Circuit's direction to the district court appears to be a sound decision that facilitates the policy of permitting prisoners to exhaust all of their claims before proceeding to federal court. Duncan v. Walker, ___ U.S. ___, 121 S. Ct. at 2130 (Stevens, J., concurring). See, also, H.R. Conf. Rep. No. 104-518, at 111 (1996).

The petitioner's arguments that the Second Circuit's decision "creates uncertainty and inconsistency in the application of the statute of limitations" and "undermines the clarity of the one-year statutory time limit" (Pet. at p.26) are similarly unavailing. Conditioning a stay on the prisoner's initiation of exhaustion wihin a limited period of time does not relieve a prisoner of the responsibility of submitting a habeas petition prior to the expiration of the one-year statute of limitations set forth in the AEDPA. Moreover, there is no reason to believe that prisoners will deliberately submit mixed petitions in order to obtain "additional time, beyond the one year permitted by the statute of limitations", as the petitioner contends, since they would only be delaying review of potentially meritorious claims while they languish in prison. See, Petrick v. Martin, 236 F.3d 624, 629 (10th Cir. 2001) ("We fail to see what a petitioner has to gain by filing a federal petition containing unexhausted claims"). In short, the Second Circuit's decision does not provide an incentive to prisoners to purposely submit mixed petitions and there is simply no basis for concluding that the dockets of our district courts will become overburdened by the occasional stay that might be required in certain cases. In any event, the Second Circuit's suggestion that the district court condition its stay on the prisoner's initiation of exhaustion within a limited time period, such as 30 days, and impose a similar condition with regard to the return to the district court, ensures that prisoners will be encouraged to litigate their claims expeditiously and obtain speedy federal relief on their claims. Rose v. Lundy, 455 U.S. at 520; Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490 (1973).

Furthermore, the petitioner's argument that certiorari is warranted because "[d]ifferent federal courts of appeals have reached three different conclusions regarding the proper disposition of a mixed petition" (Pet. at p.16) is not entirely accurate. For example, in Petrick v. Martin, 236 F.3d 624 (10th Cir. 2001), one of the decisions which the petitioner claims is in conflict with the Second Circuit's conclusion, the issue under consideration was not the propriety of a stay, but whether a federal habeas petition constituted "other collateral review" that tolled the statute of limitations under 28 U.S.C. 2244 (d) (2). Thus, since the Tenth Circuit was not squarely presented with the question of whether the prisoner's first federal habeas petition could be stayed, it cannot be concluded that the Petrick court rejected such an option, either explicitly or implicitly.[1]

In Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999), cert. denied, 529 U.S. 1097 (2000), the Fifth Circuit did address the question of whether a federal habeas petition could be held in abeyance while the prisoner returned to state court to exhaust his claims. Though the Graham court concluded that dismissal of a mixed petition was a more appropriate disposition than a stay of the exhausted claims, its rejection of the alternative of staying such a petition was by no means categorical. The Fifth Circuit's holding that "neither the cases Graham cites nor the current practice of the federal courts support the proposition that abatement of an application containing unexhausted claims is generally an acceptable substitute for dismissal" cannot be interpreted as a blanket rejection of the stay procedure adopted by the Second Circuit in this case. Moreover, the concern expressed by the Graham court that permitting a district court to stay a mixed petition "would eviscerate the AEDPA

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[1]The Petrick court also noted that it was doubtful that prisoners would attempt to manipulate the process by purposely filing mixed petitions and that "determining whether a claim has been properly exhausted, or whether exhaustion may be excused, is not always a simple matter", a conclusion shared by the Second Circuit in this case, and by this Court in Duncan v. Walker, ___ U.S. ___, 121 S. Ct. at 2130, n.2 (Stevens, J., concurring).

limitations period and thwart one of AEDPA's principal purposes", id. at 780, was eliminated by the Second Circuit's decision to condition the issuance of such a stay on the prisoner's prompt initiation of exhaustion in the state court ("normally 30 days") and prompt return to the district court after exhaustion is completed ("also within a limited period, normally 30 days").

In sum, the Second Circuit's decision does not conflict with the provisions of the AEDPA, the decisions of this Court, or the decisions of other federal courts of appeals. The petitioner's application for a writ of certiorari to review the judgment below should therefore be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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